e Court, U. S.
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No. 80-316

IN THE

Supreme Court of the United States

October Term, 1980

ADRIENNE ALEXANDER, Individually and on Behalf of All Others Similarly Situated,

Petitioner,

v.

GINO'S INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR WRIT OF CERTIORARI.

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QUESTIONS PRESENTED FOR REVIEW.

In this sex discrimination suit brought pursuant to Title VII of the Civil Rights Act of 1964, the District Court held that the defendant satisfied its burden of articulating a legitimate, non-discriminatory reason for the plaintiff's discharge even though testimony which was presented in the defendant's own case directly contradicted the asserted basis for the challenged personnel action. The District Court nowhere alluded to the contradicting testimony. The Court of Appeals affirmed the dismissal of the plaintiff's claim of disparate treatment, stating that "We have reviewed all the contentions concerning the district court's disposition of the merits of the plaintiff's individual claims and find no error." The Circuit Court also affirmed the denial of class certification on the ground that the plaintiff failed to identify a single member of a proposed class of promotional discriminatees. The questions presented are:

1) Whether a defendant in a individual disparate treatment claim under Title VII must show by credible evidence that the personnel policy or practice which is asserted to be the non-discriminatory basis for the challenged personnel action does exist in fact, and was the basis for the challenged personnel action, or whether a defendant is merely required to state a non-discriminatory reason for the personnel action, which reason the plaintiff must then prove to be pretextual?

2) Whether a defendant in an individual claim under Title VII has failed as a matter of law to articulate a legitimate, non-discriminatory basis for a challenged personnel action when evidence adduced

in the defendant's own case rebuts the defendant's asserted basis for the challenged employment decision?

3) Whether a plaintiff in an individual claim under Title VII has, as a matter of law, satisfied his or her burden of proving the pretextual nature of a reason offered by the defendant for a challenged personnel action when testimony presented in the defendant's own case rebuts the reason asserted by the defendant.

4) Did the Court of Appeals err in concluding that no member of a proposed class of promotional discriminatees was identified when the record establishes that the plaintiff presented a witness who testified to repeated incidents within the limitation period of the lawsuit when she was discriminatorily bypassed for promotion in favor of males?

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OPINIONS OF THE COURTS BELOW.

The opinion of the Third Circuit Court of Appeals appears in the official reporter at 621 F. 2d 71; and in unofficial reporters at 23 EPD ¶ 30,892; 22 FEP Cases 1253; and 29 F. R. Serv. 2d 782. The opinion of the Federal District Court for the Eastern District of Pennsylvania appears at 21 FEP Cases 183.

JURISDICTIONAL STATEMENT.

The judgment of the Third Circuit Court of Appeals for which review is sought is dated May 5, 1980. A certified copy of the judgment was issued in lieu of a formal mandate on June 6, 1980. A petition for rehearing was denied on May 29, 1980. Jurisdiction to review the judgment of the Third Circuit Court of Appeals by writ of certiorari is conferred by 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED.

This case involves Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(a), which provides:

> (a) It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

This case also involves Rule 23(a) and (b)(2) of the Federal Rules of Civil Procedure, which provides:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
>
> (b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . .

Note: The caption of the case in this Court contains the names of all parties.

STATEMENT OF THE CASE.

This action was filed in August of 1978 pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U. S. C. § 2000e, on behalf of the plaintiff-petitioner, a white female who, from June of 1972 to May of 1977, was employed in the management workforce of the defendant-respondent, a fast food corporation. The plaintiff alleged individual discrimination and retaliation on the basis of sex with respect to placement, evaluations and discipline, and class-based discrimination on the basis of sex with regard to hiring, promotions and discipline.[1]

The centerpiece of the plaintiff's individual claim is that she was discriminatorily discharged in May of 1977 after a $300.00 deposit which she made to the night depository of a bank with which the defendant dealt failed to be reported received by the bank. The defendant concedes that the plaintiff had an exemplary performance record prior to this incident. It concedes that there was no suspicion of, and the plaintiff was not discharged for theft of the funds. It also concedes that she was neither cited nor discharged for violation of any company rule or procedure in connection with the loss. (Tr. of 3/28/80 at pp. 26-27, Dep. of H. Schaefer at pp. 58-59.) The defendant neither challenged nor rebutted evidence that, between April of 1975 and August of 1978, at least nine male management employees lost company funds in amounts ranging from $50.00 to $550.00, and received only reprimands. (Exhibits P1-P9)

The defendant's personnel director sought to justify the plaintiff's discharge on the basis of an alleged company-wide policy distinction between monies lost inside a retail unit and those which are lost after removal from a retail unit: the policy allegedly called for automatic

1. The class-based hiring claim was withdrawn prior to trial.

discharge of any management employee who failed to account for company funds after removing them from a retail store. This reason was not advanced at the time of the discharge, or even after the plaintiff filed her EEOC charge, but only after litigation was commenced.

To support the testimony regarding the existence of a policy distinguishing, for disciplinary purposes, funds lost inside a unit from those lost outside, the defendant offered the discharge reports of three male management employees: one manager was discharged for theft of company receipts; a second was discharged for theft of company receipts and violation of company procedures regarding the handling of funds; a third was discharged for violation of company procedures regarding the handling of funds. Although in each case the funds were "lost" after removal from the retail unit, there was no evidence, either documentary or testimonial, that the alleged policy, as opposed to theft and violation of company rules, was in fact the basis for any of the three discharges.

The district court, on the basis of the alleged policy distinction between company funds lost inside a retail unit and those lost outside, concluded that the plaintiff's discharge was not discriminatory. *See* Appendix at p. A18. However, the district court disregarded substantial evidence which contradicts both the existence of the policy alleged by the defendant, and the assertion that the policy was in fact the basis for the plaintiff's discharge. Most significant amount the contradicting evidence is testimony by Harry Schaefer, who was the person who initiated, and was primarily and ultimately responsible for the decision to discharge the plaintiff. Mr. Schaefer, *testifying on behalf of the defendant,* stated that whether or not the receipts were lost after the plaintiff removed them from the retail store had nothing whatsoever to do with his decision to fire her. Mr. Schaefer's precise testimony was:

BY Ms. Ingram

Q. . . . did it make a difference in your assessment whether the money disappeared after it left the store or whether the money disappeared inside the unit?

A. I was concerned that the money was there when Adrienne left the store; it was with —

Q. I'm not talking about Adrienne Alexander's situation now. I'm saying that, in terms of your assessment of what types of actions justified discipline or justified partial discipline, did you treat or did you [view] the disappearance of money inside the store differently from the way you viewed the disappearance of money after it left the unit?

A. I never had it happen, so I can't say how I viewed it. It just didn't occur.

Q. So, you had not differentiated in your own mind between those circumstances?

A. I never really had to overcome that hurdle, never had to make, you know, a decision about it.

Q. You did not make that differentiation at the time that you fired Adrienne?

A. What I decided was—no, at that time, I hadn't. That hadn't crossed my mind. It really hadn't come into play, because it just hadn't occurred, to the best of my knowledge (Dep. of H. Schaefer at pp. 80-81.)

Thus, not only did Mr. Schaefer disclaim that the asserted policy had anything to do with his decision to discharge the plaintiff, but he disclaimed any knowledge of the existence of such a policy during his 12 years of service in various managerial positions with the defendant company. Moreover, the defendant's personnel director conceded—and there is no evidence to the contrary—that the alleged policy is published nowhere among the de-

fendant's detailed personnel and procedural manuals, and that the alleged policy was never raised during any of the management discussion which anticipated the plaintiff's discharge. Despite the district court's total disregard of this rebutting evidence, the court of appeals affirmed the dismissal of the plaintiff's individual claim. In so affirming the court of appeals merely stated: "We have reviewed all the contentions concerning the district court's disposition of the merits of the plaintiff's individual claims and find no error." Appendix at p. A3.

The Class Certification Issue.

The plaintiff sought certification of an "across-the board" class of women who are past and present employees in the management workforce assigned to the defendant's Philadelphia sales region. In affirming the district court's denial of class certification, the court of appeals found no abuse of discretion in the trial court's decision to treat the proposed class as two discrete sub-classes: one sub-class containing women with disciplinary and discharge claims, and the other containing women with promotional claims. Appendix at p. A8. Further, the circuit court concluded that, with respect to the discharge sub-class, it was not an abuse of discretion for the district court to determine that the claims of plaintiff's witnesses regarding disciplinary action taken against them was too individualized to make class treatment appropriate. *Id.* at p. A6. Finally, the circuit court held that the plaintiff had failed to establish the existence of a promotional sub-class because ". . . after trial the plaintiff failed to identify a single member of the class". While the plaintiff disagrees with each of these holdings, only the last one is presented for review by this Court.

Contrary to the statement of the court of appeals, at least one member of the promotional class was specifically

identified. She was not only identified, but she testified to how she had been denied promotional opportunities, and how she considered as discriminatory the defendant's failure to promote her (Tr. of 3/27/80 at pp. 51-59). Barbara Burgner, a past management employee, testified to repeated occasions within the limitation period of this lawsuit when she was bypassed for promotion in favor of males *id.* at pp. 55-57, and to how on at least one occasion she was not even afforded the opportunity to interview for promotional openings. *Id.* at p. 56. She testified that she was denied promotions despite the fact that she received high performance ratings consistently throughout her employment as a management employee with the defendant, and that stores which she managed received top regional honors during two consecutive years. *Id.* at pp. 51, 54.

Moreover, plaintiff's statistician and expert witness, Dr. Bernard Siskin, testified that his analysis of the defendant's computerized personnel records indicated that at the time of trial, there were 45 women employed in management positions within the geographical area covered by the proposed class. (Tr. of 3/27/80 at p. 62; Exhibit P-11) His analysis further demonstrated that women were disproportionately clustered in the lowest management positions (Tr. of 3/27/80 at p. 64); that management males were 3.5 times more likely than females to be promoted from assistant manager to manager (*id.*); and that the statistically significant disparity in promotional rates between men and women could not be statistically explained by differing rates of turnover, or differences between men and women with respect to initial position with the company, education, seniority, breaks in service, race or age. (Tr. of 3/27/80 at pp. 71-76; Exhibit P-14) The defendant presented no expert testimony. Neither the district court nor the court of appeals addressed the statistical evidence of class-based discrimination.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Title VII Issues.

Three of the questions presented for review—those which involve the plaintiff's individual claim of discriminatory discharge—implicate the appropriate application of the regimen which was prescribed by this Court in *McDonnell Douglas v. Green*, 411 U. S. 792 (1973) and *Furnco Construction Corp. v. Waters*, 438 U. S. 567 (1978). The Court is urged to grant certiorari as to these questions in order to resolve a conflict which presently exists among the circuits with respect to the requirements of this regimen. *See Supreme Court Rules of 1980*, Rule 17.1(a).

Since the decision in *Board of Trustees of Keene State College v. Sweeney*, 439 U. S. 24 (1978), the various courts of appeals have struggled to interpret this Court's directive that a defendant need not prove the absence of discriminatory motive, but need only articulate some legitimate, nondiscriminatory reason in order to meet a plaintiff's prima facie case of discrimination. 439 U. S. at —, 99 S. Ct. at 297. The courts have strained to apply this aspect of the regimen in a manner which is consistent with the liberal congressional intent in enacting Title VII and with notions of an equitable apportionment of evirentiary burdens between plaintiffs and defendants. The Fifth Circuit Court of Appeals has reconciled the tension by remaining steadfast to its requirement that a defendant prove nondiscriminatory reasons by a preponderance of the evidence. *Burdine v. Texas Dept. of Community Affairs*, 608 F. 2d 563, 567 (5th Cir. 1979), *cert. granted*, 48 U. S. L. W. 3823; *Turner v. Texas Instruments*, 555

F. 2d 1251, 1255 (5th Cir. 1977). This holding was recently reaffirmed in *Burdine, supra,* where the court stated:

> This holding is not inconsistent with *Board of Trustees v. Sweeney,* which merely stated that defendant is not required to prove absence of discriminatory motive. Our holding in *Turner* simply states the obvious: "articulating" a legitimate reason involves more than merely stating fictitious reasons; *legally sufficient* proof is needed before the trier of fact can find plaintiff's proof rebutted. 608 F. 2d at 567 (citations omitted; emphasis in original)

Had the *Turner* holding been applied in the instant case, the plaintiff would have undoubtedly prevailed.

On the other hand, the unavoidable implication of the Third Circuit Court's decision in the instant case is that the mere recitation by an employer of a reason which appears legitimate on its face satisfies the employer's burden of articulation, and that a district court may disregard testimony which contradicts the articulated reason, even when that testimony is introduced by the employer himself. The conflict between the Third and Fifth Circuit Courts which is manifest in the circuit court opinion in the instant case becomes even more apparent upon consideration of the Third Circuit Court's decision in *Jackson v. U. S. Steel Corporation,* — F. 2d —, 23 EPD ¶ 31,004, 22 FEP Cases 1819 (filed 6/9/80). In *Jackson,* the circuit court noted that the trial court did *not* require U. S. Steel to prove an absence of discrimination. 22 FEP Cases at 1823. Nevertheless, the circuit court held that the district court imposed too heavy a burden on the defendant by requiring that U. S. Steel "prove by a preponderance of the evidence that legitimate, non-discriminatory reasons exited for the

difference in treatment accorded Jackson and the exempt male employees . . ." *Id.* The conflict with regard to the proper application of the *McDonnell Douglas/Furnco* regimen which separates the Third and Fifth Circuits, and other circuits as well,[2] warrants review and definitive resolution of this issue by the Supreme Court.

A distinct, and equally important reason for granting the writ in this case is the importance of the federal questions involved. *See Supreme Court Rules of 1980,* Rule 17.1(c). The resolution of the question of the allocation of proof in disparate treatment cases is pivotal in determining whether Title VII will remain an effective tool for remediation of discrimination, or whether it will be emasculated through the imposition of an almost insurmountable evidentiary burden on plaintiffs. This Court has seemingly acknowledged the importance of the issues presented here by its granting of certiorari in *Burdine v. Texas Dept. of Community Affairs, supra,* where one of the questions presented is:

> Was court of appeals correct in holding that defendant in Title VII case must prove by preponderance of evidence that it relied on non-discriminatory reason in making challenged employment decision, or is de-

2. *Compare Hernandez v. Alexander,* 607 F. 2d 920 (10th Cir. 1979) (held that defendant rebutted plaintiff's prima facie case of discriminatory denial of promotion by testimony that candidate who was selected had " 'broader' qualifications" than the plaintiff) with *Osborne v. Cleland,* 620 F. 2d 195 (8th Cir. 1980) (held that hospital satisfied burden of articulating a legitimate and non-discriminatory reason for plaintiff's discharge by showing that plaintiff was told that the reason for the discharge was falsification of his application, that the falsification did in fact occur, and that the hospital pursued with respect to the plaintiff the same procedure which is invoked whenever an employee's falsification is revealed); *see also Bostick v. Boorstin,* 617 F. 2d 871 (D. C. Cir. 1980).

> fendant merely required to articulate non-discriminatory reason for decision that plaintiff must prove to be pretextual. 48 U. S. L. W. 3823

Even more than *Burdine*, the record in the instant case brings this issue into sharp focus. We therefore urge the Court to grant the writ for the separate reason of the importance of the federal questions presented.

Finally, we request that certiorari be granted because the Third Circuit Court was manifestly wrong. As the Fifth Circuit observed in *Turner, supra,* if an employer can satisfy its burden by merely reciting a facially legitimate reason, however fictitious, Title VII plaintiffs will be required to perform the draconian task of rebutting reasons which have no foundation in fact. *See Turner, supra,* 555 F. 2d at 1255. The difficulty of this task is especially evident in the instant case, where the district court was permitted to ignore substantial evidence in the employer's own case which rebutted the asserted reason for the plaintiff's discharge.

To require that an employer support by substantial evidence the reason which it advances for the challenged employment decision does not run afoul of *Sweeney's* holding that employers need not prove an absence of discriminatory motive. It merely ensures that there be factual validity to a reason before a plaintiff is called upon to show that the reason was used to hide racial, or sexual, animus. *Id.*, 555 F. 2d at 1255, n. 3; *Burdine, supra,* 608 F. 2d at 567.

The Class Certification Issue.

This Court is requested to review the Third Circuit Court's denial of certification of a promotional class because of the manifest error which inheres in the court's statement that the plaintiff failed to identify a member of the class,

or otherwise show that a promotional class exists. Even after the filing of a petition for rehearing in which the error was specifically cited, the court continues to stand upon a basis which is in total conflict with the record. It is appropriate that this Court exercise its supervisory powers to correct this error. *See Supreme Court Rules of 1980,* Rule 17.1(a).

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2255

ALEXANDER, ADRIENNE, On her own behalf and on behalf of all others similarly situated,
Appellant

v.

GINO'S, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Civ. No. 78-2672)

Argued March 20, 1980
Before: SEITZ, *Chief Judge*, and
WEIS and HIGGINBOTHAM, *Circuit Judges*
(Filed May 5, 1980)

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OPINION OF THE COURT

PER CURIAM:

The plaintiff appeals from the final judgment of the district court in this Title VII sex discrimination suit in which the court denied the plaintiff's motion for class certification and rejected her claims on the merits.

I.

The defendant is engaged in the fast food business. The plaintiff, a white female, was first hired by the defendant in 1972 as an assistant manager in the Washington, D. C., area. In January of 1974, she was transferred to Philadelphia, still as an assistant manager. During her time as an assistant manager, the plaintiff consistently received an "A" rating, the highest possible.

In the fall of 1974, a white male in the plaintiff's region was promoted from assistant manager to unit manager. The plaintiff then filed a sex discrimination charge with the Pennsylvania Human Relations Commission. In February of 1975, the plaintiff was promoted to unit manager. Although her rating dropped to "B," in early 1977 it returned to "A."

After her promotion, the plaintiff remained at the same store. She became dissatisfied because she felt the employees had difficulty adjusting to her new position and because the store had a low sales volume, which she considered an impediment to further advancement. In early 1976, the plaintiff began bringing these matters up with the area manager. In January of 1977, the plaintiff and nine other unit managers were transferred, and her new store had an even lower sales volume.

On May 15, 1977, the plaintiff was in charge of the day shift. At the end of the shift, she left the store with $300 to be deposited at the night depository at the local

bank. The next day, it was discovered that the bank could not account for this $300. On May 17, the plaintiff was suspended and the defendant began an investigation. On May 22, the plaintiff was permitted to resign instead of being discharged.

After the EEOC dismissed her charge, the plaintiff filed this suit claiming sex discrimination in the defendant's hiring, promotion, and discharge practices. The plaintiff sought certification of a class of all past and future victims of these three practices. Prior to trial, the district court denied class certification on all three claims. The plaintiff subsequently abandoned the hiring claim.

After trial, the district court reconsidered class certilcation and once again denied it. It also found that the plaintiff's individual discharge and promotion claims were without merit. This appeal followed.

II.

We have reviewed all of the contentions concerning the district court's disposition of the merits of the plaintiff's individual claims and find no error. We therefore turn to the denial of class certification.

III.

A.

Initially, we must consider whether a named plaintiff who has lost her individual claims on the merits has standing to appeal the denial of class certification. The recent decision of *United States Parole Commission v. Geraghty*, 48 U. S. L. W. 4296 (1980), requires us to conclude that such a plaintiff has standing.

In *Geraghty*, the plaintiff, who was challenging parole guidelines, was released from prison, making his individual claim moot. The Supreme Court concluded that

he still had a sufficient "personal stake" in class certification to satisfy the case or controversy requirement of article III. The Court characterized this "personal stake" as follows:

> Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so, these benefits generally are by-products of the class action device. In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the rules are met. . . .
>
> . . . The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. . . . We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired.

Id. at 4300 (footnotes and citations omitted).

Here, the plaintiff is a self-interested party pointing to the concrete factual situation of the defendant's employment practices. Both parties vigorously contest the class certification issue under the Federal Rules of Civil Procedure. Because we can perceive no reasoned distinction between the personal stake of a person whose claim is mooted and one whose claim is without substantive merit, we hold that *Geraghty* confers standing on the plaintiff here to appeal the denial of class certification. To the extent that our decision in *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F. 2d 32 (3d Cir. 1979),

indicates a contrary result, *see id.* at 36, we do not believe it survives *Geraghty.*

B.

As noted in *Geraghty,* the question of whether the requirements of Fed. R. Civ. P. 23 are satisfied is analytically distinct from the question of whether the named plaintiff has standing to appeal denial of class certification. *See* 48 U. S. L. W. at 4301. We need not decide, however, whether the plaintiff who has a meritless claim can satisfy the requirements of rule 23(a)(3) and (4)—which deal with the typicality of the plaintiff's claim and the adequacy of representation. *See East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U. S. 395 (1977). Because the district court did not rely on the merits of the plaintiff's claims in its discussion of certification, we express no view on the question.

The district court held that this case did not satisfy the requirements of rule 23(a). Rule 23(a) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

The prerequisites of 23(a) are mandatory. If the "district court appropriately applied the criteria of Rule 23(a), the scope of our review is whether the trial court [abused] its broad discretion." *Wetzel v. Liberty Mutual Insurance Co.,* 508 F. 2d 239, 245 (3d Cir.), *cert. denied,* 421 U. S. 1011 (1975). Thus we must determine whether the district court correctly assessed the promotion and discharge claims as they relate to rule 23(a). We also

note that the posture of this case is significant. Here, the district court reconsidered the denial of certification after it gave the plaintiff full opportunity at trial to prove the elements of rule 23(a).

Turning to the discharge claim, the plaintiff's complaint and the defendant's answer to the interrogatories reveal that approximately 44 women either resigned or were discharged during the 1977-1978 period. No other facts appear in the pretrial record. At trial, the plaintiff had three women testify as to the termination of their employment. Of these, one stated that she left in part because of scheduling problems and work load, another testified that she quit because the defendant believed the "lie" of another employee, and the third was discharged during the seventh week of the training period for failing to meet the defendant's standards.

The district court concluded that the facts of each case were too particularized. In effect, it held that the plaintiff had failed to show that there were common issues of law or fact within the meaning of rule 23(a)(2) and that the plaintiff's claim was so unique that it was not typical within the meaning of rule 23(a)(3).

The district court's application of (a)(2) and (a)(3) was proper. The district court did not, as the plaintiff seems to suggest, hold that the proposed class was too small in number to justify certification. Instead, the district court found that the claims were so individualized that certification was improper. It emphasized that two of the witnesses had resigned in part for personal reasons, one was discharged for unsatisfactory performance during the training period, and the plaintiff was permitted to resign in connection with an incident involving missing funds. Given that the court heard all of the evidence, including the witnesses, we cannot say, that its holding amounted to an abuse of discretion.

As to the promotion claim, the district court found that the plaintiff was in conflict with the proposed class due to her ability to influence promotion decisions, making her representation inadequate under rule 23(a)(4), and that the plaintiff had failed to specify any member of the proposed class involving promotion. We need not consider the first finding because the second was a sufficient ground for the result reached by the district court.

The complaint fails to name a single individual within the class. As to the evidence at trial, the district court noted that the testimony of the three witnesses offered as potential members of the class related to the termination of their employment. The court concluded: "The circumstances described by each have no relevance to the issue of whether the defendant's promotion policies were discriminatory." Thus the district court did not find that the class was too small but that the plaintiff had failed to even show that one existed. Given that after trial the plaintiff failed to identify a single member of the class, we find no abuse of discretion. *See Scott v. University of Delaware*, 601 F. 2d 76, 88-89 (3d Cir.), *cert. denied*, 100 S. Ct. 275 (1979); *Manning v. Princeton Consumer Discount Co.*, 533 F. 2d 102, 104 (3d Cir.), *cert. denied*, 429 U. S. 865 (1976).

The plaintiff argues that the "across the board" theory requires certification of both the discharge and promotion classes. The essence of that theory is that the named plaintiff may challenge conduct affecting the class even if he himself has not been affected by the conduct. *See Wetzel, supra*, 508 F. 2d at 247-48. In effect, it loosens the typicality and adequate representation requirements of rule 23(a)(3) and (a)(4). The plaintiff argues that the district court violated this notion by splitting the class into subclasses of promotion and discharge claims.

Two responses are in order. First, the district court has considerable discretion in utilizing subclasses under rule 23(c)(4)(B). We cannot say it was an abuse of discretion to treat the promotion and discharge claims as being distinct given the different factual and legal issues each would present. Second, the plaintiff's argument ignores the fact that before the across the board approach can apply, there still must be some class that satisfies all four requirements of rule 23(a). The crux of that approach is that once a class is properly certified, some of the requirements of rule 23(a) may be relaxed to consider claims that might not satisfy all four elements of rule 23(a). The broadening may not obscure, however, the need to have some class that satisfies the mandatory requirements of rule 23(a). Because the district court here found that there was no class that satisfied the threshold requirements of rule 23(a), the plaintiff's across the board argument is beside the point.

IV.

The judgment of the district court will be affirmed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. A. No. 78-2672

ADRIENNE ALEXANDER

v.

GINO'S, INC.

MEMORANDUM OPINION AND ORDER

WEINER, *J.* JULY 23, 1979

Plaintiff brought this employment discrimination case against the defendant pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(a), *et seq.*, seeking a declaratory judgment that the defendant's employment practices violated Title VII, reinstatement, back pay and compensation for the loss of all fringe benefits resulting from her alleged wrongful discharge. In addition, she sought class action certification and remedial relief for the class.[1] Jurisdiction was in-

1. On February 27, 1979, we entered an Opinion Order denying plaintiff's request for class action certification. On March 26, 1979, upon plaintiff's motion for reargument and reconsideration of our Order of February 27, 1979, we entered an Order denying plaintiff's request for class action certification and granting plaintiff leave to renew her motion for class action certification at the time of trial.

At trial, plaintiff renewed her motion for class action certification. She stated she sought to represent a class defined as follows: All women who, at any time since January 6, 1977, have been or will be employed in management positions within defendant's

voked pursuant to 28 U. S. C. § 1343(4) and 42 U. S. C. § 2000e-5(f)(3). The case was tried to the Court, sitting without a jury.

After careful review of the entire record, we have determined to enter judgment in favor of the defendant.

Plaintiff is a white female who is a former employee of defendant's Gino's division. She was first hired by the defendant in June, 1972 for the position of Assistant Manager in the Washington, D. C. area which position she took after the completion of four weeks of a fourteen week training program. She remained in that position until September, 1973, when she requested a transfer to Philadelphia. The transfer was approved in December, 1973, and in January, 1974 plaintiff took the position of Assistant Manager in store in the Philadelphia area.

In Philadelphia, plaintiff's initial assignment was the Goodnaw Street store where she was trained for a five week period. After the completion of her training, she was assigned to the Kensington and Torresdale unit where she worked as the Assistant Manager. Three days later, however, plaintiff was assigned to the Frankford and Pratt unit. She remained in that unit until January, 1977.

During the time plaintiff was an Assistant Manager, her quarterly evaluation ratings consistently were "A" which was the highest rating on an "A"-"B"-"C" rating scale.

In November, 1974, a white male employee working within the same region as the plaintiff, was promoted

1. (Cont'd.)

Philadelphia sales regions, and who; (a) have been or will be denied promotional opportunities by defendant; or (b) have been or will be disciplined or discharged while employed in defendant's management force.

We took plaintiff's motion under advisement, pending the completion of the trial.

from the position of Assistant Manager to that of Unit Manager. In December, 1974, plaintiff, believing that she was a victim of discriminatory practices, filed a charge of sex discrimination with the Philadelphia Human Relations Commission.

In February, 1975, plaintiff was promoted to Unit Manager of the Frankford and Pratt store, and in April, 1975, the Philadelphia Human Relations Commission closed its file on plaintiff's complaint.

Subsequent to plaintiff's promotion, her quarterly evaluation ratings were lowered to "B". In the early part of 1977, plaintiff's quarterly evaluation ratings returned to an "A" level.

Plaintiff was dissatisfied that upon her promotion she remained in the Frankford and Pratt unit. That unit's sales volume was in the lower half of the stores in the area and its condition was in a general state of disrepair. In addition, plaintiff felt it would be difficult to perform as a Unit Manager in a store where prior to her promotion she worked with the employees as an Assistant Manager.

In the early part of 1976, plaintiff commenced discussions with Dennis Kiely, the area manager, regarding the possibility of obtaining a transfer to a store with a higher sales volume.

In January, 1977, plaintiff and the nine other Unit Managers in the area, were transferred to different units as part of an area-wide move. Plaintiff was transferred to the store at Frankford and Magee, a unit which had a low sales volume. A male Unit Manager was assigned to the Frankford and Pratt store.

On May 22, 1977, plaintiff was discharged. The events leading to her termination were as follows: On May 15, 1977, plaintiff was the Unit Manager in charge of the day shift at the Frankford and Magee store. At the end of her shift, she left the unit with a bank deposit

bag containing in excess of $300.00 which amount represented the store's receipts. She was to make an after-hours deposit in the night depository at the bank with which the defendant dealt. The following day, Monday, May 16, 1977, bank officials discovered that the night deposit allegedly made by the plaintiff was not accounted for.

On May 17, 1977, the plaintiff was suspended from employment for failure to secure company funds. After a thorough investigation, the defendant decided to discharge the plaintiff from its employ. The defendant permitted the plaintiff to resign from her position rather than be terminated for cause. Plaintiff was not charged with violating any specific procedure. The sole reason for her discharge was that the bank deposit in question never was found by the bank. She was not accused of taking the money.

Following her discharge, plaintiff did not take an appeal to company officials. Rather, on July 5, 1977, she filed a charge of sex discrimination against the defendant with the U. S. Equal Employment Opportunity Commission. She alleged discriminatory retaliation and termination on an individual basis, and discriminatory hiring, promotion and discharge on a class basis.

Plaintiff's charges were dismissed by the EEOC on May 10, 1978, and on that date a Notice of Right to sue was issued to plaintiff. The EEOC determined that "no reasonable cause was found to believe that the allegations made in [plaintiff's] charge are true." The EEOC made no determination of the class issues raised by plaintiff in her charge.

On August 8, 1978, plaintiff initiated this suit. The complaint was filed within ninety days of her receipt of her Notice of Right to Sue.

Turning first to plaintiff's motion requesting class certification, the defendant contends that the plaintiff fails

to meet the prerequisites for class status under Rule 23(a) and (b)(2), of the Federal Rules of Civil Procedure. The defendant asserts that with regard to the plaintiff's discipline-discharge class claim, the plaintiff has failed to produce specific factual evidence as to the existence of both the class and common questions of law or fact. Further, the defendant contends that the plaintiff's individual claim is not typical of those of the proposed class.

With regard to the class promotion claim, the defendant asserts that the plaintiff failed to identify members of a class of women who met the prerequisites for promotion.

We agree with the defendant that even after a full trial, the plaintiff has failed to present evidence supportive of the existence of the class. Careful review of the entire record reveals that the evidence presented on the discipline discharge claims dealt with plaintiff individually. Indeed, two female witnesses who were former employees of the defendant both testified that they quit their respective jobs. The record is devoid of testimony indicative of class based discriminatory discipline or discharge action taken by the defendant.

Patricia M. Haywood, a former Assistant Manager at defendant's Brookhaven unit testified that she quit because the defendant was not able to arrange a schedule which would have enabled her to attend college. Haywood testified that the defendant refused to arrange such a schedule because at the time, they claimed they could not afford to have her miss work. In addition, she testified that she was having difficulty in completing the "Sunday paperwork", and that she was unsuccessful in obtaining assistance. As a result of her inability to properly complete the paperwork, Haywood's quarterly evaluation rating was lowered to "C". She stated that since her lower rating would effect her getting a raise, this fact also contributed to her decision to quit.

With regard to Barbara Burgner, she testified that she quit the defendant's employ because the head manager believed a "lie" told by another person and doubted her word. Burgner stated she was tired of such incidents and therefore, walked out.

Also testifying was Isabel Hunt, a black female. She stated that she was discharged during the seventh week of training because the defendant claimed she was not coming up to Gino's standards as a manager. She felt, however, that she was terminated because of her race and sex.

Examination of Hunt's record of prior work experience reveals that she was employed for thirteen years by Linton's Restaurant where she started as a salad and sandwich girl and later became a waitress, and by Broch and Company which is in the food service and vending industry. She stated that while she was with Broch and Company,[2] she had full responsibility for the operation of cafeterias which required her to plan menus, to supervise employees, and supervise ordering and baking operations.

We fail to perceive how the above evidence supports a class action suit based on an alleged discriminatory discipline and discharge policy. The law is now well settled that the plaintiff seeking class certification has the burden of establishing that she fulfills all the prerequisites and requirements of F. R. C. P. 23(a) and 23(b)(2). *Wetzel v. Liberty Mutual Insurance Co.*, 508 F. 2d 239 (3rd Cir.), cert. denied, 421 U. S. 1011, 95 S. Ct. 2415 (1975). In this case, it is clear that the circumstances of plaintiff's alleged discriminatory discharge are peculiarly individualized and personalized as to her, and therefore,

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2. Broch Company operates cafeterias in the plants of large companies. Hunt did work for Broch in its operations on the premises of ARCO, TRW, Pennsylvania Manufacturers' Insurance, and International House.

she does not have standing to represent a class on broad grounds and issues unrelated to her individual case.

Even after the completion of plaintiff's case, the requirements of the rule are not met. In *Martin v. Easton Publishing Co.*, 73 F. R. D. 678 (E. D. Pa. 1977), the court quoted with approval, portions of *Wetzel, supra* where the circuit court thoroughly discussed the nature of a (b)(2) class action. *Id.* at 682. The *Martin* court, in adopting the "cohesive" and "homogeneous" tests set forth in Wetzel, concluded that where a plaintiff's "individual" grievances are so individualized that there may be no one similarly aggrieved, the numerosity requirements of the rule are not met. In addition, that court held that in such circumstances, common issues of law and facts are not present, and the claims of the plaintiff are not typical of the claims of the class.

The factual circumstances of Isabel Hunt's discharge and of Haywood and Burgner quitting clearly differ from those of the plaintiff. Since plaintiff has failed to present specific facts which would support a (b)(2) class action, we must follow the mandate set forth in *Wetzel* and adopted by *Martin*, and refuse to certify a class based on alleged discriminatory discipline and/or discharge policies.[3]

With regard to plaintiff's attempt to have certified a class comprised of women who were discriminated against in promotions, the defendant contends that the plaintiff has failed to identify members of a class of women who met the prerequisites for promotion and plaintiff is not a proper class representative. The defendant claims that plaintiff is not a proper class representative because plaintiff has never been denied a promotion because of her sex and because plaintiff was in a position to influence the

3. Naturally, we need not delve into the merits of Hunt's, Haywood's or Burgner's terminations, in that those circumstances are not relevant to plaintiff's individual claim.

promotion of female hourly employees into the management training program.[4]

We agree with the defendant that plaintiff was in conflict with the class she seeks to represent. Indeed, plaintiff's expert witness, Dr. Siskin, testified that he imagined that decisions regarding promotions were functions of the management personnel's evaluation of skills (see N. T. pg. 75, March 27, 1979). Since plaintiff was in management, obviously, she was in a position to evaluate the skills of prospective management personnel.

Moreover, in plaintiff's complaint, she states that the exact size of her class is unknown, but she avers that the number of women in the proposed class who have been or will be denied promotions is so numerous, that joinder is impracticable. (see ¶ 7(a)). However, even after trial, plaintiff has failed to identify the members of the proposed class. Indeed, even the testimony of three female former employees failed to establish that plaintiff is a proper class representative, and that the plaintiff's claims are typical and common to the class.

Patricia Haywood's testimony focused on her decision to quit. She stated that when her quarterly evaluation ratings were lowered to "C", she realized the possibility of her getting a raise was reduced. In addition, she discussed her desire to attend college and the difficulties she had with the "Sunday" paperwork. Her testimony does not identify her as a member of the proposed class of women plaintiff seeks to represent, nor does it establish that plaintiff's claims are similar.

Similarly, Barbara Burgner's and Isabel Hunt's testimony fails to lend support to the plaintiff's efforts to have the proposed class certified. Burgner testified as to why

4. Defendant contends that the plaintiff is in direct conflict with the class she seeks to represent because she played an integral and active part in the promotional system.

she quit, while Hunt testified about her firing. The circumstances described by each have no relevance to the issue of whether the defendant's promotion policies were discriminatory. Accordingly, we deny the plaintiff's request for certification of a class on the promotional claim.

We now shall address plaintiff's individual claim, that when she was discharged by the defendant, she was submitted to disparate treatment based on her sex.

The law is well settled that in a Title VII case, initially, the plaintiff carries the burden of establishing a prima facie case of discrimination. Once established, the burden then shifts to the employer to explain the action alleged to be discriminatory. *McDonnell Douglas Corp. v. Green,* 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The defendant merely has to articulate some legitimate, nondiscriminatory reason to rebut the plaintiff's case. If the defendant is successful in rebutting the plaintiff's prima facie case, the burden then shifts back to the plaintiff, who now must persuade the fact finder of the existence of illegal discrimination. It is not required that the defendant prove the absence of a discriminatory motive. *Board of Trustees of Keene State College, et al v. Sweeney,* 99 S. Ct. 295, — U. S. — (1978).

Although *McDonnell Douglas, supra,* dealt with a claim of racial discrimination, the court has indicated that the same considerations would apply to a sex discrimination complaint under Title VII.[5] *Weigand Co. v. Jurinko,* 414 U. S. 970, 94 S. Ct. 293, 38 L. Ed. 2d 214, *Vacating Mem.,* 477 F. 2d 1038 (3rd Cir. 1973); *Holthaus v. Compton & Sons, Inc.,* 514 F. 2d 651 (8th Cir. 1975).

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5. Section 703(a) of Title VII makes it an unlawful employment practice, *inter alia,* for an employer to discriminate against any individual with regard to his employment because of his or her race or national origin. 42 U. S. C. § 2000e-2(a) (1970) *as amended,* 42 U. S. C. § 2000e-2(a) (Supp. III, 1973).

Our first inquiry, therefore, is whether the plaintiff has satisfied her burden of presenting a prima facie case. A prima facie case is presented when the plaintiff proves that she is (i) a member of the protected minority; (ii) she was discharged, and (iii) that similarly situated males were treated more favorably than she. Claims of disparate treatment must be supported by evidence of discriminatory motive. *International Brotherhood of Teamsters v. United States*, — U. S. —, 97 S. Ct. 1843, 1954 (1977).

As plaintiff correctly points out, it is not disputed that she is a member of a protected minority and she was discharged. Accordingly, we must determine whether the defendant treated similarly situated males more favorably than plaintiff and that the defendant's actions stemmed from a discriminatory motive.

Though it is arguable as to whether the plaintiff presented evidence to establish the existence of the third prong of a prima facie case, we hold that, in any event, the evidence presented by the defendant clearly satisfied its burden on rebuttal.

The thrust of plaintiff's complaint is that male management employees who lost company funds were not discharged by the defendant, but rather, received letters of reprimand. Mr. Charles Herbert Magee, Chief Personnel Officer for Gino's division, when questioned by defendant's counsel, testified as follows:

BY MR. BOURKE:

Q. Mr. Magee, are you aware of the considerations or corporation considerations in giving out reprimand versus terminations for loss of funds?

A. Yes.

Q. What is that rationale?

A. We see an essential difference between loss of money that takes place inside the restaurant and loss of money that takes place when a manager leaves the money with the bank deposits in his or her possession and the money does not get to the bank and the difference is that the person in the second case would be terminated than the person in the first case because there can be some extenuating circumstances in the restaurant and they receive a reprimand rather than termination. The reason behind that, if I may say, we have to send a clear message out to the 1500 managers who work for Gino's—I think that you can't take a free shot at us. You can't leave the unit with a deposit and not have it get to the bank. I see it as absolutely business necessity that we treat that that way.

Q. Aren't you giving them a free shot if money is lost in the unit by simply giving a reprimand?

A. A lot of times it is difficult to determine the direct culpability. We are not in the business of firing people. We have enough of a turnover. If it looks cloudy or foggy we try to give the person the benefit of the doubt. (N. T. pgs. 14, 15; March 23, 1979).

Moreover, the defendant has pointed to three instances where male management employees were terminated because company funds were missing after said manager left the particular unit with the deposit.

The plaintiff, however, attempted to make light of the defendant's evidence by proving that in each of the incidents involving the three discharged male management empolyees, a finding of violation of a specific company policy or procedure preceded the discharge, while with regard to the plaintiff, no such finding was made. The

defendant explained this distinction, however, by stating that not all of the procedures for handling cash and making deposits are listed in the defendant's administration procedures manual. (N. T. pgs. 24-25; March 28, 1979). In addition, it appears as though the defendant, in permitting the plaintiff to voluntary quit, rather than terminating her for cause, gave plaintiff an opportunity to leave the defendant's employ with an unblemished record. Plaintiff could have insisted on remaining in the defendant's employ, in which case, the defendant, in all probability, would have terminated her for cause, thereby tarnishing her work record. Accordingly, the fact that the plaintiff's personnel work form fails to state that she was charged with violating a specific procedure is not controlling.

The plaintiff also questions whether she was subjected to discriminatory action when her quarterly evaluation ratings were lowered from "A" to "B" subsequent to her promotion from Assistant Manager to Manager and when, as part of an area wide shake-up, she was transferred to a low volume unit, without regard to her request to be transferred to a high volume unit.

With regard to the ratings allegations, the defendant contends that that claim is time barred because plaintiff's claim is for a period ending in December, 1976, more than 180 days prior to the filing of her charge with the EEOC on July 5, 1977. See, 42 U. S. C. § 2000e-5(e).[6]

6. 42 U. S. C. § 2000e-5(e), provides in relevant part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . , except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency . . . , such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the

Though the defendant's argument regarding the timeliness of plaintiff's ratings claim is not frivolous, since we must view the procedural requirements of Title VII with liberality and with due deference to the beneficial purposes of the Act, we have determined to address this claim. *Love v. Pullman,* 404 U. S. 522, 92 S. Ct. 616, 30 L. Ed. 2d 679 (1972).

The defendant established that a drop in one's rating from "A" to "B", when promoted from Assistant Manager to Manager is a common occurrence, explained by the increased responsibilities falling on that individual.[7] The defendant also established that at no time did plaintiff's ratings fall below standard, but rather at all times during the course of her employment she was rated either at standard ("B") or at above standard ("A"). Lastly, the fact that plaintiff returned to an "A" rating is indicative that she was not subjected to discriminatory treatment. The evidence presented by the plaintiff on this issue fails to establish that she was treated differently than similarly situated male employees.

We now shall address plaintiff's claim of discriminatory treatment with regard to transfers. The defendant, by a preponderance of the evidence, established that the plaintiff was treated no differently than similarly situated males. It goes without saying that in any business enterprise which operates from more than one unit, one unit

6. (Cont'd.)

alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . .

7. See pgs. 19-20 of N. T., March 28, 1979, where the defendant presented proof that the change in ratings upon promotion was commonplace. Also see pg. 22, N. T., March 27, 1979, where plaintiff related her understanding of why ratings are lowered.

will have the highest sales volume, one unit will have the lowest sales volume, and the remaining units will fall somewhere in between. Similarly, the condition of the various units also must vary.

Here, the defendant explained that during the area wide shake-up of 1977, ten unit managers in the plaintiff's area were reassigned to different units, and for the most part, each manager was assigned to a unit with a sales volume comparable to that of the manager's previous unit. A male manager was assigned to the plaintiff's old unit. The mere fact that plaintiff was not placed in a high volume unit, as she desired, is not sufficient to establish discriminatory treatment, especially in view of the fact that no proof was submitted indicating that the male managers were assigned to the unit they desired.

The defendant is entitled to make employment decisions that are based upon justifiable business judgments. *Ostapowicz v. Johnson Bronze Co.*, 541 F. 2d 394 (3rd Cir. 1976). In choosing which manager to place in which unit, the defendant was doing just that.

With regard to the plaintiff's claim that she was discriminated against because she was placed in a unit that was in disrepair, the defendant explained that during the time period in question, due to financial constraints, many of its stores were in poor condition. The freeze on repairs was lifted shortly after the plaintiff was transferred from the Frankford and Pratt store We fail to perceive how this incident constitutes discriminatory treatment.

Lastly, attorney fees will not be awarded to the defendant as the court does not believe the action was frivolous, unreasonable, or without merit. *Christiansburg Garment Co. v. EEOC*, 434 U. S. 412 (1978).

In accordance with Rule 52(a) of the Fed. R. Civ. Pr. the above opinion constitutes this court's Findings of Fact and Conclusions of Law.

Accordingly, the court enters the following Order.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. A. No. 78-2672

ADRIENNE ALEXANDER

v.

GINO'S, INC.

ORDER

Plaintiff's motion for class certification is DENIED.

Judgment is entered in favor of the defendant, Gino's, Inc. and against the plaintiff, Adrienne Alexander.

IT IS SO ORDERED.

CHARLES R. WEINER
Charles R. Weiner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2255

ALEXANDER, ADRIENNE, On her own behalf and on behalf of all others similarly situated,
Appellant

v.

GINO'S INC.

(D. C. Civil No. 78-2672)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: SEITZ, *Chief Judge* and WEIS and HIGGINBOTHAM, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on March 20, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said

District Court, filed July 24, 1979, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:

/s/ THOMAS F. QUINN
Clerk

May 5, 1980

Certified as a true copy and issued in lieu of a formal mandate on June 6, 1980.

Test: M. ELIZABETH FERGUSON, Chief Deputy Clerk, U. S. Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2255

ADRIENNE ALEXANDER, et al.,
Appellant

v.

GINO'S INC.

(D. C. Civil No. 78-2672)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ SEITZ
Chief Judge

Dated: May 29, 1980

Supreme Court, U. S.
FILED
OCT 6 1980
MICHAEL RODAK, JR., CLERK

80-316

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ADRIENNE ALEXANDER, Individually and on Behalf of All Others Similarly Situated,

Petitioner,

v.

GINO'S, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

Petitioner has presented four (4) questions for review which Respondent believes are improper because they presuppose certain facts which were not specifically found by the courts below. In addition, the questions presented by Petitioner disregard the major thrust of the prior decisions and seek to take only narrow portions of those decisions into consideration.

Respondent believes that the petition properly raises only the following questions:

1. Whether the Court of Appeals erred in affirming the District Court's holding that Respondent-Defendant had successfully met its burden of rebuttal.
2. Whether the Court of Appeals erred in affirming the District Court's holding that Petitioner-Plaintiff had failed to meet the requirements of rule 23 (a) so as to deny the finding of an appropriate class or of her proper status as a class representative.

The Petition does not seek to challenge the lower court's utilization of subclasses under Rule 23 (c) (4) (B), or the failure to certify a class on the issue of discharge. Nor does the Petition challenge the court's application of the "across the board" theory.

OPINIONS OF THE COURTS BELOW

The opinion of the Third Circuit Court of Appeals appears in the official reporter at 621 F.2d 71; and in unofficial reporters at 23 EPD para. 30,892; 22 FEP Cases 1253; and 29 F. R. Serv. 2d 782. The opinion of the Federal District Court for the Eastern District of Pennsylvania appears at 21 FEP Cases 183.

JURISDICTIONAL STATEMENT

The judgment of the Third Circuit Court of Appeals for which review is sought is dated May 5, 1980. A certified copy of the judgment was issued in lieu of a formal mandate

on June 6, 1980. A petition for rehearing was denied on May 29, 1980. Jurisdiction to review the judgment of the Third Circuit Court of Appeals by writ of certiorari is conferred by 28 U. S. C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

As presented in Petitioner's Writ, this case involves Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), and Rule 23 (a) and (b) (2) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Nature of the Case

The instant appeal arises out of an employment discrimination action brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* and as a pendent state claim under The Pennsylvania Human Relations Act, 43 P.S. § 955 (d). Petitioner alleged discriminatory acts against herself individually of termination based on sex and of retaliation, together with class allegations of discrimination in hiring, promotion and discharge based on sex.

On Ocober 31, 1979, the Court, in response to Respondent's motion, dismissed the pendent state claim.

On February 27, 1979, the Court denied Petitioner's Request For Class Certification. On March 26, 1979, the Court denied her Motion for Reargument and Reconsideration of Class Certification, but with leave to renew her motion at trial.

At trial on March 27 & 28, 1979, Petitioner submitted the following allegations under Title VII:

1. Plaintiff individually — termination
   — retaliatory transfer and evaluation.
2. Women employees — promotion, discharge, and/or discipline within defendant's management force in the Philadelphia area on or after January 6, 1977.

Trial evidence was taken over the two days, and was then supplemented by depositional testimony. After submission of proposed findings of fact and conclusions of law, and post-trial memoranda by both sides, the District Court issued its Memorandum Opinion and Order on July 23, 1979. The District Court, in its final Order, denied Petitioner's motion for certification of a class action, and entered judgment in favor of the Respondent and against the Petitioner with regard to Petitioner's individual claims of gender discrimination and retaliation (A. p. 23).

B. Factual Background

Petitioner was originally hired by Respondent in June 1972, as a Management Trainee in the Washington, D.C., area. After training she was promoted to the position of Assistant Manager and served in that capacity in various Washington, D.C., units. (Tr. of March 27, 1979, p. 6)

In December 1973-January, 1974, Petitioner, at her own request, was transferred to an available opening in one of Petitioner's Philadelphia units where, in February 1975, she was promoted to the position of Unit Manager. (Tr. 3/27/79, pp. 12-14, 18). Prior to that promotion Petitioner filed a complaint with The Philadelphia Human Rights Commission alleging discrimination in promotion. That charge was administratively closed without any action two months after she was promoted (Tr. 3/27/79, pp. 17, 18).

In January 1977, Petitioner and the nine other Unit Managers in her area were reassigned to different units as part of an area-wide move. (Tr., 3/27/80 p. 25). Of the ten transfers, four managers (4), including Petitioner, went to units with comparable sales volumes, three males went to lower volume units, and one male to an increased volume unit. (Defendant's Exhibit 8, Tr. 3/28/80, pp. 16, 17). The transfers had no bearing on salary, benefits, or other conditions of employment and Petitioner's predecessors and replacements were all males. Similarly, the physical characteristics of her units were not different from other units (Tr. 3/28/80, pp. 10, 43).

Respondent maintains a quarterly employee rating system of "A—above standard", "B—standard", "C—below standard". Assistant Managers must be "A" rated to be considered for promotion and year-end raises are based on these evaluations. As an Assistant, Petitioner was continually rated "A". However, for a period of time following her promotion to Manager she received "B" ratings. She returned to "A" ratings in 1977 prior to her termination (Tr. 3/27/80, pp. 17, 21, 26).

A study of Manager evaluations 1976-1978, indicates that a drop in ratings from A to B upon promotion is a common happening reflective of the increased duties and responsibilities of the higher position. (Defendant's Exhibit 9, 3/28/80, pp. 19, 20).

On May 15, 1977, Petitioner was the Manager-in-charge of the day shift at her assigned unit. At the end of her shift she left the unit with a deposit bag containing approximately $309.00. She was to make an after-hours deposit in a night depository. Although she maintains she put the money in the depository, it was not found when three bank officials opened the depository the next morning. Other deposits from that same unit for that day were in the depository.

On May 17, 1977, Petitioner was suspended pending investigation of the missing deposit. Following a thorough investigation she was charged with failure to secure company funds and allowed to resign on March 22, 1977, rather than being terminated for cause (Tr. 3/27/80, pp. 27-30; A. p. A20).

Petitioner introduced examples of nine males who received written reprimands when monies disappeared from individual units while they were in charge. (Plaintiff's Exhibits 1-9, Tr. 3/27/80, pp. 93, 94). Respondent cited examples of three males terminated when, like Petitioner, deposits within their personal possession and control failed to show up at the bank (Defendant's Exhibits 1-6, Tr. 3/28/80, pp. 11-15). There was no showing of males not

terminated for missing funds which left a unit in their possession. At least one female was reprimanded for monies missing in a unit (Defendant's Exhibit 12, Tr. 3/28/80, p. 16).

On or about July 5, 1977, Petitioner filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission (EEOC) alleging discriminatory retaliation and termination individually, and hiring, promotion and discharge as a class. On May 5, 1978, the EEOC issued its No Cause Determination denying Petitioner's individual allegations but making no determination or investigation of the class issues. On August 8, 1978, this action was commenced.

At trial on March 27, 28, 1979, the following issues were before the Court:

A. May this action be maintained as a class action on behalf of the following classes:

   1. All women employees who have been or will be discharged or otherwise disciplined while employed in a management position within the Philadelphia area in defendant's Gino's Division, on or after January 6, 1977;

   2. All women employees who have been or will be denied promotions to management positions within the Philadelphia area in defendant's Gino's Division, on or after January 6, 1977.

B. Assuming, *arguendo,* that class status is proper, has plaintiff established the requisite standard of proof to support her claims.

C. As to plaintiff's individual allegations, has she established the requisite standard of proof to establish a timely claim of discriminatory retaliation and termination.

Petitioner's case consisted of her own testimony, the testimony of a statistical expert and of three former em-

ployees, two of whom quit voluntarily and one who was terminated during the training period. None had filed charges of discrimination with state or federal agencies and none presented evidence of discriminatory treatment outside of vague personal conclusions (136-154, 177-188, Tr. 3/27/80, pp. 43-61, 84-95.)

Petitioner's statistical witness testified that he reviewed a proposed class of eleven female assistant managers (Tr. 3/27/80, p. 78), but he did not compare them as qualified for promotion versus qualified male assistants (Tr. 3/27/80, p. 82). Among his conclusions were that the size of his sample was too small by itself to establish statistically significant patterns (Tr. 3/27/80, pp. 79, 80); that males and females tend to be assigned high and low volume units on an equal and nondiscriminatory basis (Tr. 3/27/80, p. 77); no statistically significant difference in the terminations of males and females was found. (Tr. 3/27/80, pp. 78, 82).

Petitioner presented no rebuttal testimony or evidence following Respondent's case presentation which included clear and concise explanations of Respondent's case and other similar and dissimilar situations (A. pp. 18, 19).

ARGUMENT

The Petition before the Court raises no compelling or important reasons for the grant of certiorari. Contrary to Petitioner's claim, there is no conflict among the circuits and no important federal question which may be resolved through this case. In fact, the decision below is a routine application of now settled law regarding the burdens of proof and rebuttal in a Title VII discrimination action. Further, Petitioner's reference to error in the denial of class certification is itself a misunderstanding of the decisions below.

I. The Title VII Issues

In a line of cases beginning in 1973, this Court has set down specific standards to be applied by the Courts in al-

lotting the burden of proof and rebuttal in Title VII actions. *Board of Trustees of Keene State College* v. *Sweeney,* 439 U.S. 24 (1978); *Furnco Construction Co.* v. *Waters,* 438 U.S. 567 (1978); *McDonnell Douglas* v. *Green,* 411 U.S. 792 (1973). The gravaman of Petitioner's complaint was that she was the victim of desparate treatment; that she, as a female, was terminated for lost funds while males who also lost money were only given reprimands or suspended. In its findings and conclusions, the District Court noted the *McDonnell Douglas-Furnco* regimen and found that Petitioner's treatment, as a matter of fact and law, was not different than that given males. The Court noted that as a matter of fact, all employees losing money outside the store in their possession were terminated while those having money disappear while locked in the store receive lesser punishment. The Court then concluded that those undisputed facts were sufficient, as a matter of law, to fulfill Respondent-defendant's burden of rebuttal. Any inference of pretext was discarded as unsubstantiated.

The Court of Appeals, on review, found no error. It is noteworthy that throughout the Court of Appeals proceedings, the Petitioner-Appellant steadfastly maintained that she did not challenge the findings of fact. Yet is was those very facts that proved Respondent-Appellee's position.

In this Court, Petitioner seeks to create a conflict between the Third Circuit Court's decision here and the Fifth Circuit's decision in *Burdine* v. *Texas Department of Community Affairs,* 608 F.2d 563 (5th Cir. 1979), which requires ". . . legally sufficient proof is needed before the trier of fact can find plaintiff's proof rebutted." 608 F.2d at 567. But a reading of the District Court's opinion shows Judge Weiner not just accepting a mere articulation of a legitimate reason, but in fact, a full analysis of the facts which showed nondiscriminatory treatment and the exercise of legitimate, nondiscriminatory business judgment. (A. pp. 18-20). The Court considered all of the arguments of pretext presented here and rejected them by the very standard Petitioner seeks. Recognizing this, the Circuit Court re-

viewed and affirmed. There is no indication that a lesser or improper standard was used.

Further, to the extent a question of applicable standards may be appropriate, the vehicle for that review is *Burdine* where certiorari has been granted and where the issue was directely before the Circuit Court, not here where the issue was not clearly in dispute with this Court's pronouncements.

In essence, Petitioner has failed to recognize the facts as found by the Courts below, which facts provide the answers to the questions raised here. The major premise of Petitioner's Review Questions two and three is that certain facts defeat Respondent-Defendant's rebuttal and establish a showing of pretext. But the Courts below did not find those facts or the evidence presented. What was found was an established practice confirmed by all witnesses and records. The court specifically declined to accept an out of context and leading quote from a deposition as proof of pretext, especially when the full quotation supports the broader rebuttal.

As the Rules of this Court point out, a review on writ of certiorari is a matter of judicial discretion to be granted only when there are special and important reasons. The instant case is not such a situation. Although the lofty questions for review presented by Petitioner are indeed interesting, the facts of this case simply do not apply to those questions.

II. Class Certification Issue

Petitioner maintains that the Third Circuit Court's denial of certification of a promotional class was in error to the extent the Court held that she failed to identify members of the class, or otherwise show that a promotional class exists.[1] Again, Petitioner has failed to properly comprehend the Court's action.

[1] Petitioner does not challenge the denial of class certification on the issue of discipline and discharge.

At trial, Petitioner-Plaintiff failed to provide relevant statistical evidence on the issue of promotion and failed to identify potentional class members. What she did present were the personal feelings of a former employee. One individual cannot constitute a class. Further, based on the sketchy testimony presented, the District Court found that there was not a sufficient showing of class interest based on that one individual. More importantly, the denial of class certification on the promotional issue was based on several failings most notably the failure of Petitioner-Plaintiff as a proper representative, which has not been raised here. In affirming, the Circuit Court found the individual cited by Petitioner lacking in sufficient proof and that the requirements of Rule 23 (a) were not met.

The questions sought to be raised for review to this Court are indeed weighty issues. But they have no bearing on this case. The District Court made certain findings of fact which it then applied to the standard of proof laid down by this Court. It then reached certain conclusions of law denying the complaint. The Court of Appeals applied those same unchallenged facts in a deliberate analysis of proof and affirmed the lower court. What Petitioner is saying here is she simply disagrees. The questions she seeks to present are not and were not issues in this case, because the standard she seeks to enforce was used.

The decision of the Court of Appeals is not clearly in conflict with the decision of another appeals court nor is there anything in the proceedings below that call for an exercise of this Court's supervisory powers. Finally, there has been no important question of Federal law decided in conflict with this Court. This was, and is, a routine application of law consistent with established precedent which fairly and judiciously considered all the evidence. That Petitioner is dissatisfied with those results is not sufficient reason for this Court to exercise its discretion and grant the writ of certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 79-2255

ALEXANDER, ADRIENNE, On her own behalf and on behalf of all others similarly situated,
Appellant

v.

GINO'S, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
(D. C. Civ. No. 78-2672)

Argued March 20, 1980
Before: SEITZ, *Chief Judge*, and
WEIS and HIGGINBOTHAM, *Circuit Judges*
(Filed May 5, 1980)

Germaine Ingram (Argued)
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OPINION OF THE COURT

PER CURIAM:

The plaintiff appeals from the final judgment of the district court in this Title VII sex discrimination suit in which the court denied the plaintiff's motion for class certification and rejected her claims on the merits.

I.

The defendant is engaged in the fast food business. The plaintiff, a white female, was first hired by the defendant in 1972 as an assistant manager in the Washington, D. C., area. In January of 1974, she was transferred to Philadelphia, still as an assistant manager. During her time as an assistant manager, the plaintiff consistently received an "A" rating, the highest possible.

In the fall of 1974, a white male in the plaintiff's region was promoted from assistant manager to unit manager. The plaintiff then filed a sex discrimination charge with the Pennsylvania Human Relations Commission. In February of 1975, the plaintiff was promoted to unit manager. Although her rating dropped to "B," in early 1977 it returned to "A."

After her promotion, the plaintiff remained at the same store. She became dissatisfied because she felt the employees had difficulty adjusting to her new position and because the store had a low sales volume, which she considered an impediment to further advancement. In early 1976, the plaintiff began bringing these matters up with the area manager. In January of 1977, the plaintiff and nine other unit managers were transferred, and her new store had an even lower sales volume.

On May 15, 1977, the plaintiff was in charge of the day shift. At the end of the shift, she left the store with $300 to be deposited at the night depository at the local

bank. The next day, it was discovered that the bank could not account for this $300. On May 17, the plaintiff was suspended and the defendant began an investigation. On May 22, the plaintiff was permitted to resign instead of being discharged.

After the EEOC dismissed her charge, the plaintiff filed this suit claiming sex discrimination in the defendant's hiring, promotion, and discharge practices. The plaintiff sought certification of a class of all past and future victims of these three practices. Prior to trial, the district court denied class certification on all three claims. The plaintiff subsequently abandoned the hiring claim.

After trial, the district court reconsidered class certilcation and once again denied it. It also found that the plaintiff's individual discharge and promotion claims were without merit. This appeal followed.

II.

We have reviewed all of the contentions concerning the district court's disposition of the merits of the plaintiff's individual claims and find no error. We therefore turn to the denial of class certification.

III.

A.

Initially, we must consider whether a named plaintiff who has lost her individual claims on the merits has standing to appeal the denial of class certification. The recent decision of *United States Parole Commission v. Geraghty*, 48 U. S. L. W. 4296 (1980), requires us to conclude that such a plaintiff has standing.

In *Geraghty*, the plaintiff, who was challenging parole guidelines, was released from prison, making his individual claim moot. The Supreme Court concluded that

he still had a sufficient "personal stake" in class certification to satisfy the case or controversy requirement of article III. The Court characterized this "personal stake" as follows:

> Although the named representative receives certain benefits from the class nature of the action, some of which are regarded as desirable and others as less so, these benefits generally are by-products of the class action device. In order to achieve the primary benefits of class suits, the Federal Rules of Civil Procedure give the proposed class representative the right to have a class certified if the requirements of the rules are met. . . .
>
> . . . The imperatives of a dispute capable of judicial resolution are sharply presented issues in a concrete factual setting and self-interested parties vigorously advocating opposing positions. . . . We conclude that these elements can exist with respect to the class certification issue notwithstanding the fact that the named plaintiff's claim on the merits has expired.

Id. at 4300 (footnotes and citations omitted).

Here, the plaintiff is a self-interested party pointing to the concrete factual situation of the defendant's employment practices. Both parties vigorously contest the class certification issue under the Federal Rules of Civil Procedure. Because we can perceive no reasoned distinction between the personal stake of a person whose claim is mooted and one whose claim is without substantive merit, we hold that *Geraghty* confers standing on the plaintiff here to appeal the denial of class certification. To the extent that our decision in *Al Barnett & Son, Inc. v. Outboard Marine Corp.*, 611 F. 2d 32 (3d Cir. 1979),

indicates a contrary result, *see id.* at 36, we do not believe it survives *Geraghty.*

B.

As noted in *Geraghty,* the question of whether the requirements of Fed. R. Civ. P. 23 are satisfied is analytically distinct from the question of whether the named plaintiff has standing to appeal denial of class certification. *See* 48 U. S. L. W. at 4301. We need not decide, however, whether the plaintiff who has a meritless claim can satisfy the requirements of rule 23(a)(3) and (4)—which deal with the typicality of the plaintiff's claim and the adequacy of representation. *See East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U. S. 395 (1977). Because the district court did not rely on the merits of the plaintiff's claims in its discussion of certification, we express no view on the question.

The district court held that this case did not satisfy the requirements of rule 23(a). Rule 23(a) provides: "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

The prerequisites of 23(a) are mandatory. If the "district court appropriately applied the criteria of Rule 23(a), the scope of our review is whether the trial court [abused] its broad discretion." *Wetzel v. Liberty Mutual Insurance Co.,* 508 F. 2d 239, 245 (3d Cir.), *cert. denied,* 421 U. S. 1011 (1975). Thus we must determine whether the district court correctly assessed the promotion and discharge claims as they relate to rule 23(a). We also

note that the posture of this case is significant. Here, the district court reconsidered the denial of certification after it gave the plaintiff full opportunity at trial to prove the elements of rule 23(a).

Turning to the discharge claim, the plaintiff's complaint and the defendant's answer to the interrogatories reveal that approximately 44 women either resigned or were discharged during the 1977-1978 period. No other facts appear in the pretrial record. At trial, the plaintiff had three women testify as to the termination of their employment. Of these, one stated that she left in part because of scheduling problems and work load, another testified that she quit because the defendant believed the "lie" of another employee, and the third was discharged during the seventh week of the training period for failing to meet the defendant's standards.

The district court concluded that the facts of each case were too particularized. In effect, it held that the plaintiff had failed to show that there were common issues of law or fact within the meaning of rule 23(a)(2) and that the plaintiff's claim was so unique that it was not typical within the meaning of rule 23(a)(3).

The district court's application of (a)(2) and (a)(3) was proper. The district court did not, as the plaintiff seems to suggest, hold that the proposed class was too small in number to justify certification. Instead, the district court found that the claims were so individualized that certification was improper. It emphasized that two of the witnesses had resigned in part for personal reasons, one was discharged for unsatisfactory performance during the training period. and the plaintiff was permitted to resign in connection with an incident involving missing funds. Given that the court heard all of the evidence, including the witnesses, we cannot say, that its holding amounted to an abuse of discretion.

As to the promotion claim, the district court found that the plaintiff was in conflict with the proposed class due to her ability to influence promotion decisions, making her representation inadequate under rule 23(a)(4), and that the plaintiff had failed to specify any member of the proposed class involving promotion. We need not consider the first finding because the second was a sufficient ground for the result reached by the district court.

The complaint fails to name a single individual within the class. As to the evidence at trial, the district court noted that the testimony of the three witnesses offered as potential members of the class related to the termination of their employment. The court concluded: "The circumstances described by each have no relevance to the issue of whether the defendant's promotion policies were discriminatory." Thus the district court did not find that the class was too small but that the plaintiff had failed to even show that one existed. Given that after trial the plaintiff failed to identify a single member of the class, we find no abuse of discretion. *See Scott v. University of Delaware,* 601 F. 2d 76, 88-89 (3d Cir.), *cert. denied,* 100 S. Ct. 275 (1979); *Manning v. Princeton Consumer Discount Co.,* 533 F. 2d 102, 104 (3d Cir.), *cert. denied,* 429 U. S. 865 (1976).

The plaintiff argues that the "across the board" theory requires certification of both the discharge and promotion classes. The essence of that theory is that the named plaintiff may challenge conduct affecting the class even if he himself has not been affected by the conduct. *See Wetzel, supra,* 508 F. 2d at 247-48. In effect, it loosens the typicality and adequate representation requirements of rule 23(a)(3) and (a)(4). The plaintiff argues that the district court violated this notion by splitting the class into subclasses of promotion and discharge claims.

Two responses are in order. First, the district court has considerable discretion in utilizing subclasses under rule 23(c)(4)(B). We cannot say it was an abuse of discretion to treat the promotion and discharge claims as being distinct given the different factual and legal issues each would present. Second, the plaintiff's argument ignores the fact that before the across the board approach can apply, there still must be some class that satisfies all four requirements of rule 23(a). The crux of that approach is that once a class is properly certified, some of the requirements of rule 23(a) may be relaxed to consider claims that might not satisfy all four elements of rule 23(a). The broadening may not obscure, however, the need to have some class that satisfies the mandatory requirements of rule 23(a). Because the district court here found that there was no class that satisfied the threshold requirements of rule 23(a), the plaintiff's across the board argument is beside the point.

IV.

The judgment of the district court will be affirmed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. A. No. 78-2672

ADRIENNE ALEXANDER

v.

GINO'S, INC.

MEMORANDUM OPINION AND ORDER

WEINER, *J.* JULY 23, 1979

Plaintiff brought this employment discrimination case against the defendant pursuant to the provisions of Title VII of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-2(a), *et seq.*, seeking a declaratory judgment that the defendant's employment practices violated Title VII, reinstatement, back pay and compensation for the loss of all fringe benefits resulting from her alleged wrongful discharge. In addition, she sought class action certification and remedial relief for the class.[1] Jurisdiction was in-

1. On February 27, 1979, we entered an Opinion Order denying plaintiff's request for class action certification. On March 26, 1979, upon plaintiff's motion for reargument and reconsideration of our Order of February 27, 1979, we entered an Order denying plaintiff's request for class action certification and granting plaintiff leave to renew her motion for class action certification at the time of trial.

At trial, plaintiff renewed her motion for class action certification. She stated she sought to represent a class defined as follows: All women who, at any time since January 6, 1977, have been or will be employed in management positions within defendant's

voked pursuant to 28 U. S. C. § 1343(4) and 42 U. S. C. § 2000e-5(f)(3). The case was tried to the Court, sitting without a jury.

After careful review of the entire record, we have determined to enter judgment in favor of the defendant.

Plaintiff is a white female who is a former employee of defendant's Gino's division. She was first hired by the defendant in June, 1972 for the position of Assistant Manager in the Washington, D. C. area which position she took after the completion of four weeks of a fourteen week training program. She remained in that position until September, 1973, when she requested a transfer to Philadelphia. The transfer was approved in December, 1973, and in January, 1974 plaintiff took the position of Assistant Manager in store in the Philadelphia area.

In Philadelphia, plaintiff's initial assignment was the Goodnaw Street store where she was trained for a five week period. After the completion of her training, she was assigned to the Kensington and Torresdale unit where she worked as the Assistant Manager. Three days later, however, plaintiff was assigned to the Frankford and Pratt unit. She remained in that unit until January, 1977.

During the time plaintiff was an Assistant Manager, her quarterly evaluation ratings consistently were "A" which was the highest rating on an "A"-"B"-"C" rating scale.

In November, 1974, a white male employee working within the same region as the plaintiff, was promoted

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1. (Cont'd.)

Philadelphia sales regions, and who; (a) have been or will be denied promotional opportunities by defendant; or (b) have been or will be disciplined or discharged while employed in defendant's management force.

We took plaintiff's motion under advisement, pending the completion of the trial.

from the position of Assistant Manager to that of Unit Manager. In December, 1974, plaintiff, believing that she was a victim of discriminatory practices, filed a charge of sex discrimination with the Philadelphia Human Relations Commission.

In February, 1975, plaintiff was promoted to Unit Manager of the Frankford and Pratt store, and in April, 1975, the Philadelphia Human Relations Commission closed its file on plaintiff's complaint.

Subsequent to plaintiff's promotion, her quarterly evaluation ratings were lowered to "B". In the early part of 1977, plaintiff's quarterly evaluation ratings returned to an "A" level.

Plaintiff was dissatisfied that upon her promotion she remained in the Frankford and Pratt unit. That unit's sales volume was in the lower half of the stores in the area and its condition was in a general state of disrepair. In addition, plaintiff felt it would be difficult to perform as a Unit Manager in a store where prior to her promotion she worked with the employees as an Assistant Manager.

In the early part of 1976, plaintiff commenced discussions with Dennis Kiely, the area manager, regarding the possibility of obtaining a transfer to a store with a higher sales volume.

In January, 1977, plaintiff and the nine other Unit Managers in the area, were transferred to different units as part of an area-wide move. Plaintiff was transferred to the store at Frankford and Magee, a unit which had a low sales volume. A male Unit Manager was assigned to the Frankford and Pratt store.

On May 22, 1977, plaintiff was discharged. The events leading to her termination were as follows: On May 15, 1977, plaintiff was the Unit Manager in charge of the day shift at the Frankford and Magee store. At the end of her shift, she left the unit with a bank deposit

bag containing in excess of $300.00 which amount represented the store's receipts. She was to make an after-hours deposit in the night depository at the bank with which the defendant dealt. The following day, Monday, May 16, 1977, bank officials discovered that the night deposit allegedly made by the plaintiff was not accounted for.

On May 17, 1977, the plaintiff was suspended from employment for failure to secure company funds. After a thorough investigation, the defendant decided to discharge the plaintiff from its employ. The defendant permitted the plaintiff to resign from her position rather than be terminated for cause. Plaintiff was not charged with violating any specific procedure. The sole reason for her discharge was that the bank deposit in question never was found by the bank. She was not accused of taking the money.

Following her discharge, plaintiff did not take an appeal to company officials. Rather, on July 5, 1977, she filed a charge of sex discrimination against the defendant with the U. S. Equal Employment Opportunity Commission. She alleged discriminatory retaliation and termination on an individual basis, and discriminatory hiring, promotion and discharge on a class basis.

Plaintiff's charges were dismissed by the EEOC on May 10, 1978, and on that date a Notice of Right to sue was issued to plaintiff. The EEOC determined that "no reasonable cause was found to believe that the allegations made in [plaintiff's] charge are true." The EEOC made no determination of the class issues raised by plaintiff in her charge.

On August 8, 1978, plaintiff initiated this suit. The complaint was filed within ninety days of her receipt of her Notice of Right to Sue.

Turning first to plaintiff's motion requesting class certification, the defendant contends that the plaintiff fails

to meet the prerequisites for class status under Rule 23(a) and (b)(2), of the Federal Rules of Civil Procedure. The defendant asserts that with regard to the plaintiff's discipline-discharge class claim, the plaintiff has failed to produce specific factual evidence as to the existence of both the class and common questions of law or fact. Further, the defendant contends that the plaintiff's individual claim is not typical of those of the proposed class.

With regard to the class promotion claim, the defendant asserts that the plaintiff failed to identify members of a class of women who met the prerequisites for promotion.

We agree with the defendant that even after a full trial, the plaintiff has failed to present evidence supportive of the existence of the class. Careful review of the entire record reveals that the evidence presented on the discipline discharge claims dealt with plaintiff individually. Indeed, two female witnesses who were former employees of the defendant both testified that they quit their respective jobs. The record is devoid of testimony indicative of class based discriminatory discipline or discharge action taken by the defendant.

Patricia M. Haywood, a former Assistant Manager at defendant's Brookhaven unit testified that she quit because the defendant was not able to arrange a schedule which would have enabled her to attend college. Haywood testified that the defendant refused to arrange such a schedule because at the time, they claimed they could not afford to have her miss work. In addition, she testified that she was having difficulty in completing the "Sunday paperwork", and that she was unsuccessful in obtaining assistance. As a result of her inability to properly complete the paperwork, Haywood's quarterly evaluation rating was lowered to "C". She stated that since her lower rating would effect her getting a raise, this fact also contributed to her decision to quit.

With regard to Barbara Burgner, she testified that she quit the defendant's employ because the head manager believed a "lie" told by another person and doubted her word. Burgner stated she was tired of such incidents and therefore, walked out.

Also testifying was Isabel Hunt, a black female. She stated that she was discharged during the seventh week of training because the defendant claimed she was not coming up to Gino's standards as a manager. She felt, however, that she was terminated because of her race and sex.

Examination of Hunt's record of prior work experience reveals that she was employed for thirteen years by Linton's Restaurant where she started as a salad and sandwich girl and later became a waitress, and by Broch and Company which is in the food service and vending industry. She stated that while she was with Broch and Company,[2] she had full responsibility for the operation of cafeterias which required her to plan menus, to supervise employees, and supervise ordering and baking operations.

We fail to perceive how the above evidence supports a class action suit based on an alleged discriminatory discipline and discharge policy. The law is now well settled that the plaintiff seeking class certification has the burden of establishing that she fulfills all the prerequisites and requirements of F. R. C. P. 23(a) and 23(b)(2). *Wetzel v. Liberty Mutual Insurance Co.*, 508 F. 2d 239 (3rd Cir.), cert. denied, 421 U. S. 1011, 95 S. Ct. 2415 (1975). In this case, it is clear that the circumstances of plaintiff's alleged discriminatory discharge are peculiarly individualized and personalized as to her, and therefore,

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2. Broch Company operates cafeterias in the plants of large companies. Hunt did work for Broch in its operations on the premises of ARCO, TRW, Pennsylvania Manufacturers' Insurance, and International House.

she does not have standing to represent a class on broad grounds and issues unrelated to her individual case.

Even after the completion of plaintiff's case, the requirements of the rule are not met. In *Martin v. Easton Publishing Co.*, 73 F. R. D. 678 (E. D. Pa. 1977), the court quoted with approval, portions of *Wetzel, supra* where the circuit court thoroughly discussed the nature of a (b)(2) class action. *Id.* at 682. The *Martin* court, in adopting the "cohesive" and "homogeneous" tests set forth in Wetzel, concluded that where a plaintiff's "individual" grievances are so individualized that there may be no one similarly aggrieved, the numerosity requirements of the rule are not met. In addition, that court held that in such circumstances, common issues of law and facts are not present, and the claims of the plaintiff are not typical of the claims of the class.

The factual circumstances of Isabel Hunt's discharge and of Haywood and Burgner quitting clearly differ from those of the plaintiff. Since plaintiff has failed to present specific facts which would support a (b)(2) class action, we must follow the mandate set forth in *Wetzel* and adopted by *Martin*, and refuse to certify a class based on alleged discriminatory discipline and/or discharge policies.[3]

With regard to plaintiff's attempt to have certified a class comprised of women who were discriminated against in promotions, the defendant contends that the plaintiff has failed to identify members of a class of women who met the prerequisites for promotion and plaintiff is not a proper class representative. The defendant claims that plaintiff is not a proper class representative because plaintiff has never been denied a promotion because of her sex and because plaintiff was in a position to influence the

3. Naturally, we need not delve into the merits of Hunt's, Haywood's or Burgner's terminations, in that those circumstances are not relevant to plaintiff's individual claim.

promotion of female hourly employees into the management training program.[4]

We agree with the defendant that plaintiff was in conflict with the class she seeks to represent. Indeed, plaintiff's expert witness, Dr. Siskin, testified that he imagined that decisions regarding promotions were functions of the management personnel's evaluation of skills (see N. T. pg. 75, March 27, 1979). Since plaintiff was in management, obviously, she was in a position to evaluate the skills of prospective management personnel.

Moreover, in plaintiff's complaint, she states that the exact size of her class is unknown, but she avers that the number of women in the proposed class who have been or will be denied promotions is so numerous, that joinder is impracticable. (see ¶7(a)). However, even after trial, plaintiff has failed to identify the members of the proposed class. Indeed, even the testimony of three female former employees failed to establish that plaintiff is a proper class representative, and that the plaintiff's claims are typical and common to the class.

Patricia Haywood's testimony focused on her decision to quit. She stated that when her quarterly evaluation ratings were lowered to "C", she realized the possibility of her getting a raise was reduced. In addition, she discussed her desire to attend college and the difficulties she had with the "Sunday" paperwork. Her testimony does not identify her as a member of the proposed class of women plaintiff seeks to represent, nor does it establish that plaintiff's claims are similar.

Similarly, Barbara Burgner's and Isabel Hunt's testimony fails to lend support to the plaintiff's efforts to have the proposed class certified. Burgner testified as to why

4. Defendant contends that the plaintiff is in direct conflict with the class she seeks to represent because she played an integral and active part in the promotional system.

she quit, while Hunt testified about her firing. The circumstances described by each have no relevance to the issue of whether the defendant's promotion policies were discriminatory. Accordingly, we deny the plaintiff's request for certification of a class on the promotional claim.

We now shall address plaintiff's individual claim, that when she was discharged by the defendant, she was submitted to disparate treatment based on her sex.

The law is well settled that in a Title VII case, initially, the plaintiff carries the burden of establishing a prima facie case of discrimination. Once established, the burden then shifts to the employer to explain the action alleged to be discriminatory. *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). The defendant merely has to articulate some legitimate, nondiscriminatory reason to rebut the plaintiff's case. If the defendant is successful in rebutting the plaintiff's prima facie case, the burden then shifts back to the plaintiff, who now must persuade the fact finder of the existence of illegal discrimination. It is not required that the defendant prove the absence of a discriminatory motive. *Board of Trustees of Keene State College, et al v. Sweeney*, 99 S. Ct. 295, — U. S. — (1978).

Although *McDonnell Douglas, supra,* dealt with a claim of racial discrimination, the court has indicated that the same considerations would apply to a sex discrimination complaint under Title VII.[5] *Weigand Co. v. Jurinko*, 414 U. S. 970, 94 S. Ct. 293, 38 L. Ed. 2d 214, *Vacating Mem.*, 477 F. 2d 1038 (3rd Cir. 1973); *Holthaus v. Compton & Sons, Inc.*, 514 F. 2d 651 (8th Cir. 1975).

5. Section 703(a) of Title VII makes it an unlawful employment practice, *inter alia*, for an employer to discriminate against any individual with regard to his employment because of his or her race or national origin. 42 U. S. C. § 2000e-2(a) (1970) *as amended*, 42 U. S. C. § 2000e-2(a) (Supp. III, 1973).

Our first inquiry, therefore, is whether the plaintiff has satisfied her burden of presenting a prima facie case. A prima facie case is presented when the plaintiff proves that she is (i) a member of the protected minority; (ii) she was discharged, and (iii) that similarly situated males were treated more favorably than she. Claims of disparate treatment must be supported by evidence of discriminatory motive. *International Brotherhood of Teamsters v. United States*, — U. S. —, 97 S. Ct. 1843, 1954 (1977).

As plaintiff correctly points out, it is not disputed that she is a member of a protected minority and she was discharged. Accordingly, we must determine whether the defendant treated similarly situated males more favorably than plaintiff and that the defendant's actions stemmed from a discriminatory motive.

Though it is arguable as to whether the plaintiff presented evidence to establish the existence of the third prong of a prima facie case, we hold that, in any event, the evidence presented by the defendant clearly satisfied its burden on rebuttal.

The thrust of plaintiff's complaint is that male management employees who lost company funds were not discharged by the defendant, but rather, received letters of reprimand. Mr. Charles Herbert Magee, Chief Personnel Officer for Gino's division, when questioned by defendant's counsel, testified as follows:

BY MR. BOURKE:

Q. Mr. Magee, are you aware of the considerations or corporation considerations in giving out reprimand versus terminations for loss of funds?

A. Yes.

Q. What is that rationale?

A. We see an essential difference between loss of money that takes place inside the restaurant and loss of money that takes place when a manager leaves the money with the bank deposits in his or her possession and the money does not get to the bank and the difference is that the person in the second case would be terminated than the person in the first case because there can be some extenuating circumstances in the restaurant and they receive a reprimand rather than termination. The reason behind that, if I may say, we have to send a clear message out to the 1500 managers who work for Gino's—I think that you can't take a free shot at us. You can't leave the unit with a deposit and not have it get to the bank. I see it as absolutely business necessity that we treat that that way.

Q. Aren't you giving them a free shot if money is lost in the unit by simply giving a reprimand?

A. A lot of times it is difficult to determine the direct culpability. We are not in the business of firing people. We have enough of a turnover. If it looks cloudy or foggy we try to give the person the benefit of the doubt. (N. T. pgs. 14, 15; March 23, 1979).

Moreover, the defendant has pointed to three instances where male management employees were terminated because company funds were missing after said manager left the particular unit with the deposit.

The plaintiff, however, attempted to make light of the defendant's evidence by proving that in each of the incidents involving the three discharged male management empolyees, a finding of violation of a specific company policy or procedure preceded the discharge, while with regard to the plaintiff, no such finding was made. The

defendant explained this distinction, however, by stating that not all of the procedures for handling cash and making deposits are listed in the defendant's administration procedures manual. (N. T. pgs. 24-25; March 28, 1979). In addition, it appears as though the defendant, in permitting the plaintiff to voluntary quit, rather than terminating her for cause, gave plaintiff an opportunity to leave the defendant's employ with an unblemished record. Plaintiff could have insisted on remaining in the defendant's employ, in which case, the defendant, in all probability, would have terminated her for cause, thereby tarnishing her work record. Accordingly, the fact that the plaintiff's personnel work form fails to state that she was charged with violating a specific procedure is not controlling.

The plaintiff also questions whether she was subjected to discriminatory action when her quarterly evaluation ratings were lowered from "A" to "B" subsequent to her promotion from Assistant Manager to Manager and when, as part of an area wide shake-up, she was transferred to a low volume unit, without regard to her request to be transferred to a high volume unit.

With regard to the ratings allegations, the defendant contends that that claim is time barred because plaintiff's claim is for a period ending in December, 1976, more than 180 days prior to the filing of her charge with the EEOC on July 5, 1977. See, 42 U. S. C. § 2000e-5(e).[6]

6. 42 U. S. C. § 2000e-5(e), provides in relevant part:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . , except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State or local agency . . . , such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the

Though the defendant's argument regarding the timeliness of plaintiff's ratings claim is not frivolous, since we must view the procedural requirements of Title VII with liberality and with due deference to the beneficial purposes of the Act, we have determined to address this claim. *Love v. Pullman,* 404 U. S. 522, 92 S. Ct. 616, 30 L. Ed. 2d 679 (1972).

The defendant established that a drop in one's rating from "A" to "B", when promoted from Assistant Manager to Manager is a common occurrence, explained by the increased responsibilities falling on that individual.[7] The defendant also established that at no time did plaintiff's ratings fall below standard, but rather at all times during the course of her employment she was rated either at standard ("B") or at above standard ("A"). Lastly, the fact that plaintiff returned to an "A" rating is indicative that she was not subjected to discriminatory treatment. The evidence presented by the plaintiff on this issue fails to establish that she was treated differently than similarly situated male employees.

We now shall address plaintiff's claim of discriminatory treatment with regard to transfers. The defendant, by a preponderance of the evidence, established that the plaintiff was treated no differently than similarly situated males. It goes without saying that in any business enterprise which operates from more than one unit, one unit

6. (Cont'd.)

alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier. . . .

7. See pgs. 19-20 of N. T., March 28, 1979, where the defendant presented proof that the change in ratings upon promotion was commonplace. Also see pg. 22, N. T., March 27, 1979, where plaintiff related her understanding of why ratings are lowered.

will have the highest sales volume, one unit will have the lowest sales volume, and the remaining units will fall somewhere in between. Similarly, the condition of the various units also must vary.

Here, the defendant explained that during the area wide shake-up of 1977, ten unit managers in the plaintiff's area were reassigned to different units, and for the most part, each manager was assigned to a unit with a sales volume comparable to that of the manager's previous unit. A male manager was assigned to the plaintiff's old unit. The mere fact that plaintiff was not placed in a high volume unit, as she desired, is not sufficient to establish discriminatory treatment, especially in view of the fact that no proof was submitted indicating that the male managers were assigned to the unit they desired.

The defendant is entitled to make employment decisions that are based upon justifiable business judgments. *Ostapowicz v. Johnson Bronze Co.*, 541 F. 2d 394 (3rd Cir. 1976). In choosing which manager to place in which unit, the defendant was doing just that.

With regard to the plaintiff's claim that she was discriminated against because she was placed in a unit that was in disrepair, the defendant explained that during the time period in question, due to financial constraints, many of its stores were in poor condition. The freeze on repairs was lifted shortly after the plaintiff was transferred from the Frankford and Pratt store We fail to perceive how this incident constitutes discriminatory treatment.

Lastly, attorney fees will not be awarded to the defendant as the court does not believe the action was frivolous, unreasonable, or without merit. *Christiansburg Garment Co. v. EEOC*, 434 U. S. 412 (1978).

In accordance with Rule 52(a) of the Fed. R. Civ. Pr. the above opinion constitutes this court's Findings of Fact and Conclusions of Law.

Accordingly, the court enters the following Order.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C. A. No. 78-2672

ADRIENNE ALEXANDER

v.

GINO'S, INC.

ORDER

Plaintiff's motion for class certification is DENIED.

Judgment is entered in favor of the defendant, Gino's, Inc. and against the plaintiff, Adrienne Alexander.

IT IS SO ORDERED.

CHARLES R. WEINER
Charles R. Weiner